No. [redacted] 65

# Supreme Court of the United States

McCALLUM & ROBINSON, INC., PETITIONER,

VS.

BERRYMAN HENWOOD, TRUSTEE FOR ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, RESPONDENT.

**PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, WESTERN DIVISION, AND TO THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.**

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**PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, WESTERN DIVISION, AND TO THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.**

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

**STATEMENT OF MATTER INVOLVED.**

This case involves the construction of certain sections of the Interstate Commerce Act: (1) U. S. Code, Title 49, Sec. 16, paragraphs 3(a) and 3(e) fixing a three year period of limitation within which actions to recover freight charges must be brought. The State Court decision nullifies this Court's construction of this section of the Act. These

shipments moved prior to the Amendment of the Act of September 18, 1940, reducing the limitation period from three to two years.

(2) This case also involves the construction of U. S. Code, Title 49, Sec. 2, Sec. 3 and Sec. 6(1) and 6(7), and certain tariffs filed by respondent pursuant to the requirements of the Act. The State Court's decision is contrary to the policy of the Federal Statutes in that that decision sanctions unjust discrimination between interstate shippers and eliminates uniformity and equality in the treatment of such shippers.

## II.

## JURISDICTION.

Jurisdiction of this cause is given this Court by U. S. Code, Title 28, Sec. 344. The case presents a question arising under the laws of the United States; viz., the sections of the Interstate Commerce Act referred to above and quoted hereinafter (Brief *post* pp. 9, 10 and 11). The decision of the State Court here complained of is directly contrary to and not in accord with applicable decisions of this court, particularly *Midstate Horticultural Company* v. *Pennsylvania R. Co.*, 320 U. S. 356, 64 S. Ct. 128, and cases therein cited (S. Ct. Rule 38, Par. 5(a)).

## III.

## QUESTION SUBSTANTIAL.

That this case presents a substantial question has already been determined by this court in granting certiorari in *Midstate Horticultural Company* v. *Pennsylvania R. Co.*, *supra*, where the same question was raised as to Section 16 of the Interstate Commerce Act. This court

evidently granted certiorari in that case to set at rest the question there decided; but the conclusion reached by the State Court in this case is directly contrary and sets up a different system of administering the Federal Statute in the State of Tennessee.

In addition to the question presented as to U. S. Code, Title 49, Sec. 16, Pars. 3(a) and 3(e), the case also presents a substantial question in that many thousands of bales of cotton are shipped every year from western origins into Memphis, Tennessee (and other concentration points), under transit tariffs similar to those here involved. The State decisions interpret these tariffs so as to leave the door wide open for the practice by the rail carriers of discrimination as between shippers using the same carrier and as between shippers using different carriers. The State Court decision upholds the respondent's granting of material extensions of credit to certain shippers in spite of the prohibitions contained in U. S. Code, Title 49, Sec. 3(2); and in spite of the prohibitions contained in U. S. Code, Title 49, Sec. 6(7), the State Court decision upholds the respondent's charging one group of shippers a lower rate from western origins to Memphis, Tennessee (and other concentration points), than it charges other shippers.

Substantial justice in the administration of the Interstate Commerce Act which establishes a policy of uniform treatment of all shippers, requires that the administration of the Act in the State of Tennessee conform to the Federal decisions.

## IV.

## QUESTION, HOW RAISED IN STATE COURT.

The last of the shipments of cotton here involved was delivered to petitioner at Memphis, Tennessee, by the re-

spondent on or before January 11, 1937 (Original and amended bill, Tr. pp. 1-5). The original suit in this cause was filed by respondent September 16, 1941—four years, eight months and five days after the respondent delivered the cotton to petitioner in Memphis, the destination named in the Bills of Lading (Tr. p. 1).

The question of the application and interpretation of the Statute of Limitations contained in U. S. Code, Title 49, Sec. 16, paras. 3(a) and 3(e) was raised by demurrer (Tr. p. 5) and was decided in favor of this petitioner by the Chancery Court (Tr. p. 6). On appeal by the respondent to the Supreme Court of Tennessee, that decision was reversed and the cause remanded to the Trial Court for further proceedings (Tr. p. 7; 179 Tenn. 531, 167 S. W. 2d 981). The question was again raised by petitioner's answer (Tr. p. 15); was decided against this petitioner by the Chancery Court and by the Court of Appeals of Tennessee, Western Division (Tr. pp. 28, 29).

Petitioner filed its petition requesting the Supreme Court of Tennessee to bring the case again before that court by certiorari to the Court of Appeals (Tr. p. 40); but the Supreme Court of Tennessee denied the certiorari (Tr. p. 58).

The question of the proper application and interpretation of U. S. Code, Title 49, Sec. 1(4), Sec. 3(2) and Sec. 6(1) and 6(7) was raised by answer (Tr. p. 15, 25 and by assignments of error in the Court of Appeals of Tennessee, in the petition for certiorari filed in the Supreme Court of Tennessee (Tr. p. 40, 53); which petition for certiorari was denied (Tr. p. 58).

The decision of these questions and the judgment against this petitioner became final as of the 17th day of January, 1947, being then finally determined by the highest court of the State of Tennessee available to this petitioner by appeal or any other method of review.

V.

## SPECIFICATION OF ERRORS.

1. The Court of Appeals erred in refusing to dismiss this action because it was not brought within three years from the time the cause of action accrued.

Original Bill, Tr. p. 1,
Amended Bill, Tr. p. 4, 5.
Opinion, Tr. pp. 30-39.
179 Tenn. 531.
49 U. S. C., Sec. 16, Pars. 3(a) and 3(e).

2. The Supreme Court of Tennessee erred in overruling petitioner's demurrer and in denying certiorari and declining to reverse the decision of the Court of Appeals of Tennessee refusing to dismiss respondent's action, because this suit was not brought within three years from the time the cause of action accrued.

Citations above.
Opinion, Tr. p. 7, 179 Tenn. 531.
Order, Tr. p. 58.

3. The Court of Appeals erred in holding that petitioner had not paid the full freight charges collectible on the movements of cotton and in holding that tariffs 8859E and 8859F did not fix the full reasonable local rate from Houston to Memphis.

Tr. pp. 30-39.
Tr. ~~Vol.~~ 68A-77, Exhibits 23-H and 24, Roberts.

4. The Court of Appeals erred in holding that the freight charges on the shipments of cotton here involved

should be made in accord with Tariffs 208C and 208D, instead of in accord with Tariffs 8859E and 8859F and Supplements, because the Intermediate Rule under Tariffs 208C and 208D does not apply where there is in any other tariff a commodity rate on the same article to the intermediate destination point applicable over the same route from the same point of origin.

Tariffs 8859E and 8859F, Tr. Vol. ....., Ex. No. 23, H Roberts, Item 15-A; and Ex. No. 24 Roberts, Item 20-A.

Item 130 of Tariff 208C and 208D, Tr. Vols. ..... Exs. Nos. 25 and 26, Item 130, p. 66.

49 U. S. C., Sec. 1(4), Sec. 3, Sec. 6(1) and 6(7).

5. The Supreme Court of Tennessee erred in denying certiorari to the Court of Appeals of Tennessee to review and reverse its decision set out in Specifications 3 and 4 above.

Order, Tr. p. .....

## CONCLUSION.

Wherefore, your Petitioner prays that Writs of Certiorari issue under the Seal of this Court directed to the Supreme Court of Tennessee and to the Court of Appeals of Tennessee, Western Division, commanding said courts to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Courts had in the case numbered and entitled Docket No. 3 Shelby Chancery, *Berryman Henwood as Trustee for St. Louis Southwestern Railway Company, Appellee,* v. *McCallum & Robinson, Inc., Appellant,* to the end that this

cause may be reviewed and determined by this court as provided for by the Statutes of the United States; and that the judgment herein of said State Courts be reversed by this court, and for such further relief as to this court may seem proper.

This 15th day of April, 1947.

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# Supreme Court of the United States

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VS.

BERRYMAN HENWOOD, TRUSTEE FOR ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, RESPONDENT.

## BRIEF AND ARGUMENT.

I.

The provisions contained in 49 U. S. C., Sec. 16, Pars. 3(a) and 3(e) limit the time for bringing an action to recover a deficiency in freight charges to within three years after shipment has been delivered by the carrier at the destination named in the bill of lading.

> "Limitation of actions. (a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." 49 U. S. C., Sec. 16, Par. 3(a).
>
> "(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after." 49 U. S. C., Sec. 16, Par. 3(e).
>
> *Pennsylvania R. Co.* v. *Carolina Portland Cement Co.*, 16 F. 2d 760.
>
> *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 64 S. Ct. 128.

II.

As the lapse of the statutory period of three years not only bars the remedy, but destroys the liability, nothing done thereafter can extend the time for bringing the action.

*Midstate Horticultural Co., Inc.*, v. *Pennsylvania R. Co.*, 320 U. S. 356, 64 S. Ct. 128.

*A. J. Phillips Co.* v. *Grand Trunk Western Ry.*, 236 U. S. 622, 35 S. Ct. 444, 446, 59 L. Ed. 774.

*United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914.

*Kansas City So. R. R.* v. *Wolf*, 261 U. S. 133, 43 S. Ct. 259, 67 L. Ed. 571.

*Danzer & Co.* v. *Gulf & Ship Island R. R.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 467.

*Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.*, 7 Cir., 88 F. 2d 459.

*Button* v. *Atchison, T. & S. F. Ry.*, 8 Cir., 1 F. 2d 709.

*Pennsylvania R. R.* v. *Carolina Portland Cement Co.*, 4 Cir., 16 F. 2d 760.

III.

The Interstate Commerce Act requires carriers to file tariffs and prohibits carriers from extending credit or unjustly discriminating between shippers.

"*Payment of freight as prerequisite to delivery.* No carrier by railroad subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: * * *" 49 U. S. C., Sec. 3(2).

"*Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 49 U. S. C., Sec. 6(7).

IV.

The Intermediate Rule contained in Tariffs 208C and 208D does not apply where there is in any other tariff commodity rate on the same article to the intermediate destination.

Item 130 of said Tariffs provides:

"Subject to the provisions of Notes 1, 2, 3 and 4 below, to any point of destination to which a commodity rate on a given article from a given point of origin and via a given route is not named in this Tariff, which point is intermediate to a point to which a commodity rate on said article is published in this Tariff via a route through the intermediate point over which such commodity rate applies from the same point of origin, apply to such intermediate point from such point of origin and via such route the commodity rate

in this Tariff on said article to the next point beyond to which a commodity rate is published herein on that article from the same point of origin via the same route.

"Note 4—If there is in any other tariff a commodity rate on the same article to the intermediate destination point applicable over the same route from the same point of origin, the provisions of this rule are not applicable to such intermediate destination point."

To construe the tariff provisions above set out as contended for by respondent would be to make respondent guilty of such discrimination, and to extend a credit to some shippers in the amount of 23 cents per 100 pounds for the period of time from delivery of the property to the time of suit and recovery, while other shippers are required to pay cash. If it can be reasonably done, tariffs will be construed so as to sustain their legality.

In the Transit Tariffs 8859E and 8859F is a commodity rate (42 cents) on the same article (cotton) to the intermediate destination point (Memphis) applicable over the same route from the same point of origin (Houston). Said Tariffs provide:

"Except where rates are provided under column B on pages 9 to 15, inclusive, * * * inbound charges to the storage point will be computed by use of the following distance scale of rates, except that to Memphis, Tennessee, rates will be 2¢ per 100 lbs. higher than the rates shown below. * * * 600 miles and over 550, 40¢ per 100 lbs." Tariffs 8859E and 8859F, Items 15 and 15-A, Exhibits 23 and 24, Roberts Tr. ~~Vol.~~ 684-70

No rates are provided from Houston to Memphis on pages 9 to 15, inclusive (Citations above).

V.

A tariff has the force of a statute and will be construed as a statute and so as to sustain its legality.

*Great Northern Ry. Co.* v. *Delmar Co.*, 283 U. S. 686, 51 S. Ct. 579.

*Pa. R. Co.* v. *International Coal Min. Co.*, 230 U. S. 184, 33 S. Ct. 893, 896.

VI.

Tariffs in effect at time of shipment control subsequent events cannot change applicable tariffs.

*Swift & Co.* v. *U. S.*, 255 Fed. 291.

13 C. J. S. (Carriers), Sec. 311, p. 722.

VII.

In cases of doubt as to which of two tariffs applies to a shipment, the more specific tariff will be applied. In case of ambiguity, the shipper is entitled to the more favorable rate.

*U. S.* v. *Gulf Ref. Co.*, 268 U. S. 542, 546, 45 S. Ct. 597.

*Pillsbury Flour Mills Co.* v. *Gr. N. Ry. Co.*, 25 F. 2d 66.

*Western Grain Co.* v. *St. L. & S. F. Ry. Co.*, 56 F. 2d 160.

## ARGUMENT.

### Essential Facts.

It is essential that the court have in mind the following facts:

The cotton involved in this suit was delivered to the petitioner at Memphis upon Bills of Lading designating the point of origin as Houston, Texas, and the destination as Memphis, Tennessee. It is for an alleged deficiency in freight charges on these shipments that this suit is brought.

The last shipment was delivered to the petitioner on January 11, 1937. The original bill was filed on September 16, 1941—four years, eight months and five days after the last delivery.

The shipments moved into Memphis on freight charges of 42 cents per 100 pounds as fixed by Local and Joint Tariffs 8859E and 8859F. If claim for adjustment of the outbound charges is seasonably made, these tariffs give the shipper the privilege of re-shipping out of Memphis for the balance of the through rate from Houston to ultimate destination beyond Memphis.

No such adjustment of outbound charges to the through rate was claimed as to these shipments. Respondent contends in order to obtain the 42 cent rate, exercise of the transit privileges after delivery at Memphis is obligatory; and that, since no claim for adjustment of outbound charges was made, a rate of 65 cents per 100 pounds provided, by use of the Intermediate Rule in Item 130 of Tariffs 208C and 208D, applies to these shipments.

Respondent's contentions in these regards were sustained by the State Courts of Tennessee, which held that this action could be maintained in spite of the lapse of time,

on the theory that the cause of action did not accrue until the expiration of the time allowed for the exercise of the transit privileges.

Paragraph 3(e) of Section 16 of the Act fixes the time when the cause of action accrues as "upon delivery or tender of delivery * * * by the carrier and not after." Respondent alleges that this cotton was not re-shipped but was disposed of locally (Original Bill, Tr. p. 3). Therefore, on this theory, the only possible delivery or tender of delivery by the carrier was at Memphis. It is for the movement into Memphis that recovery is sought. No freight charges for any movement out of Memphis are involved.

The State Courts of Tennessee lost sight of the fact that as to this movement into Memphis, Paragraph 3 (e) fixes the time of delivery at Memphis as the time of accrual of the cause of action. The State Courts also lost sight of the fact that the limitation contained in Paragraph 3 (a) destroys the liability as well as the remedy and that no event subsequent to that delivery could extend the period for bringing suit.

It is agreed that if Tariffs 8859E and 8859F do not fix the local rate and, if Tariffs 208C and 208D apply to these shipments, the charges under the latter tariffs have been correctly figured and that the amount of the judgment in the State Court would, in that event, be correct. But petitioner contends that it has already paid the full, proper charges for the movement of cotton into Memphis and that this suit should be dismissed.

We desire to consider the questions thus presented under two divisions. (1) The Statute of Limitations (Specifications of Error 1 and 2) and (2) The Tariffs applicable (Specifications of Error 3 to 5).

I.

**Statute of Limitations.**

The applicable statutory provisions are quoted in the Brief (*supra,* p. 9). The controlling authorities are the case of *Midstate Horticultural Co., supra,* and cases there cited. These cases hold that the period of limitation in the statute is jurisdictional, and that the lapse of time destroys the liability as well as the remedy. Therefore, nothing done after the accrual of the action; *i. e.,* after delivery by the carrier, can extend the time for filing suit.

In the *Midstate Horticultural case, supra,* construing the same section of the statute, this court granted certiorari to the Supreme Court of California (319 U. S. 735), and reversed the State Court's holding that an agreement of parties to extend the period for bringing suit was effectual.

We quote briefly from this court's opinion:

> "Respondent (railroad) sued to recover the full amount of freight charges on twenty-one carloads of grapes shipped by petitioner over its own and connecting carrier's lines from California to stated destinations in New York and New Jersey. The ultimate question is whether the action was brought in time under Sec. 16(3)(a) of the Interstate Commerce Act. * * * The question turns on whether the section's limitation can be waived by express agreement made before the period ends * * *.
>
> "In all stages of the litigation petitioner has contended that the statute prohibits maintenance of the action, notwithstanding its agreement. Respondent has taken the contrary view as have the California District Court of Appeals * * * and the California Supreme Court. * * * *We think petitioner's position must be sustained*" (Italics supplied).

Reviewing other decisions, this Court says:

> "The purport of the decisions is that Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished. Thus, in *A. J. Phillips Co.* v. *Grand Trunk Western Ry.*, this Court held the objection to the timeliness of the shipper's suit properly was raised by demurrer, and said that 'the lapse of time * * * destroys the liability * * * whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction.' 236 U. S. 662, 667, 35 S. Ct. 444, 446, 59 L. Ed. 774. And is assigned as a reason for this view 'the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act', including the carrier's obligations to adhere to the legal rate, make only lawful refunds, and refrain from discriminating among shippers 'by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period.' *Ibid.* In *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914, the conception of the Phillips case was applied to proceedings before the Commission, as the Phillips opinion had forecast. The Court held that the limitation goes to the Commission's jurisdiction, so that on the one hand it has no power to act when the time has expired, on the other mandamus will lie to compel exercise of the jurisdiction when the period has not passed. The other decisions cited above give effect to this pattern in various applications."

The Court concludes:

> "*The judgment is reversed* * * *" (Italics supplied) *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 357, 364 and 367.

If the statutory period cannot be extended by express agreement of the parties, as held in the above case, then certainly it cannot be extended by the adoption of an *ex parte* tariff by which the carrier (as is contended here) agrees that it will allow a shipper one year of the statutory period of three years within which to reship. Within the three years fixed by statute the carrier may refrain from suing if it chooses, but no agreement to delay does or can extend the period for bringing suit as fixed by the statute.

Admittedly, in this case, suit was not brought within three years after delivery of the cotton at Memphis. Nor was suit brought within three years after the expiration of the time within which charges for the reshipment out of Memphis could be adjusted to the balance of the through rate from Houston to ultimate destination. Both tariffs contain provisions limiting to one year the time within which cotton must be reshipped if adjustment of outbound charges is to be claimed (Tariff 8859E, Sup. 8; Item 70B, Exhibit 23H—Roberts; Tariff 8859F, Item 70, Exhibit 24, Roberts).

Succeeding Tariffs or Supplements published and made effective subsequent to date of delivery of the shipments at Memphis attempted to extend the time for reshipment out of Memphis with the through-rate privilege, but this case does not involve the rates on reshipment. Respondent relies upon the allegation that this cotton was not reshipped.

Nevertheless, the State Court held that these subsequent extensions of time for reshipment with the transit privilege of preserving the through rate, had the effect of extending the time for filing suit to recover alleged undercharge on the original movement into Memphis. Thus the State Court held that the subsequent amendments of the

tariffs had the effect of amending the Act of Congress limiting the time for bringing suit.

It is the tariff in effect at the time of the contract for the shipment that controls. Subsequent changes in tariff provisions cannot affect the contract.

> 'The character of this shipment, or any freight shipment, must be determined at the time the shipment begins, and cannot be changed, so far as the application of rates is concerned, by the subsequent conduct of either the consignor or the consignee." *Swift & Co.* v. *U. S.*, 255 Fed. 291.

The State Court decision rests on three erroneous premises: (1) That the inbound movement to Memphis was a part of one through shipment to some contemplated ultimate destination; (2) That the delivery or tender of delivery contemplated by the statute was the delivery or tender of delivery at the destination to which the cotton was reshipped beyond Memphis, and (3) That the statute did not begin to run until the expiration of the extended time for reshipment from Memphis on balance of through rate.

(1) That the outbound movement from Memphis (if it did take place) could not be considered a part of one through movement is definitely held by this court in *A., T. & S. Fe* v. *U. S.*, 279 U. S. 768, 49 S. Ct. 494.

> "When the outbound shipment from Kansas City is made, the grain goes forward on a new bill of lading at the balance of the through rate. Obviously this practice cannot convert the independent shipment of grain from Kansas City to the Gulf via the Southern into a through movement from Dodge City to the Gulf. The two transportation services are not only entirely distinct, but they are often rendered in respect to wholly different merchandise."

(2) The Respondent's allegation and proof is that this cotton was not reshipped from Memphis, and therefore, there was no delivery or tender of delivery at any destination beyond Memphis. The only delivery was at Memphis. The statute begins to run upon delivery at the destination named in the bill of lading (Memphis) as to freight charges on the movement. This is true even though a part of the charges accrue for services rendered after the delivery. In the case of *Pennsylvania R. Co.* v. *Carolina Portland Cement Co., supra,* the court says:

> "We think that the clear meaning of this statute is that actions by carriers to recover charges made with respect to a shipment of goods must be commenced within three years after delivery is made or tendered, even though a part of the charges sought to be recovered be for services rendered after tender of delivery. The language of the statute is clear, and does not require that we resort to any rules of construction or interpretation to ascertain its meaning."

This case was cited with approval by this Court in Midstate Horticultural Company case.

(3) That events subsequent to the movements of cotton cannot extend the period of limitation is clearly held in another case cited by this court with approval in Midstate Horticultural Company case. We quote from the Circuit Court of Appeals decisions:

> "* * * appellee's cause of action arose out of appellant's failure to pay charges due on the shipment of goods. According to the mandate of Section 16(3)-(e), 49 U. S. C. A., Sec. 16(3)(e), a cause of action in respect of a shipment of property shall be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. *Hence events occurring subsequent to the delivery may not be relied upon to extend the period within which the suit must be*

*brought." Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.*, 88 F. 2d 459 (Italics supplied).

And the question is set at rest by the *Midstate Horticultural Company* case itself where this court denied the subsequent extension even by agreement of the parties (*supra*, p. 16).

Since this action was not brought within the time provided by Section 16(3)(a) and (3)(e) of the Interstate Commerce Act, writs requested should issue and respondent's suit should be dismissed.

## II.

### Construction of Tariffs.

The foregoing contention, if sustained, disposes of this case and the court need not consider the contentions here made. Petitioner, nevertheless, desires to show that it has paid the full charges provided by the applicable tariff and to call attention to the extent to which the State Court went in order to sustain respondent's claim for a recovery.

The Statutory provisions are quoted in the brief, *supra*, (Brief pp. 10-11). They express the fundamental policy of the Interstate Commerce Act, *i. e.*, that all shippers shall be treated alike and that no credit or other special privilege shall be extended to one and denied to another. Here again the Court should bear in mind that it is the rate into Memphis that is involved—not a through rate to a point beyond Memphis.

The tariffs involved are creatures of the Interstate Commerce Act. Being such, they partake of the nature of statutes and are to be construed so as to sustain their legality. In the case of *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U. S. 686, 51 S. Ct. 579, this Court had before it

the interpretation of a tariff, one construction of which would make it violate Section 4 of the Interstate Commerce Act, while the other construction would make it consistent with the requirements of Section 4. In disposing of the question, this Court says:

> "The railway can transport the shipments over the shorter and customary route without violating section 4; but, if the tariff is construed to require it to take them over the longer route, it must violate that section and incur the resulting penalties. In this situation we think the tariff should be construed as applying only to the shorter route, and not as giving the shipper the option between the two routes at the through rate. This conclusion is in accord with the principle that, where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law." *Ibid*, p. 690.

The rule of law is clearly stated in the case of *Pennsylvania R. Co.* v. *International Coal Min. Co.*, 230 U. S. 184, 33 S. Ct. 893:

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike." *Ibid*, p. 197.

Each of the tariffs under which this cotton moved is entitled "Local and Joint Freight Tariffs." Each is a commodity tariff on cotton and provides the rates at which cotton may be shipped from Western points to Memphis. By use of mileage table (Tariff 8859E, Sup. 8, Item 15A(d)) the rate from Houston to Memphis is fixed at 42 cents. The State Courts sustain the contention of respondent that the exercise of the transit privilege is obligatory to obtain the 42 cent rate. Transit *privileges* cannot be obligatory—the terms are incompatible. Transit privileges are optional.

"In *Lindsey Bros. Co.* v. *G. N. Ry. Co.*, 113 I. C. C. 166, it was stated:

" '*Transit is optional*, and when the charges made by the use of the transit are higher than the charges at the full local rate from transit station to final destination the shipper can elect to pay the lower charges. In this case it elected to take advantage of transit, and therefore, the rates assessed were applicable.' " *Washburn Crosby Co.* v. *C., B. & Q. R. Co.*, 206 I. C. C. 654.

But if the contention of respondent as sustained by the State Courts is correct, then the respondent has surrendered a shipment from Houston to Memphis without having collected the full local charges as required by Section 3(2) of the Act. Respondent has extended a credit for the difference between 65 cents and 42 cents in violation of the statute. The State Courts' interpretation of the tariff renders it illegal as discriminating between shippers by charging one 65 cents cash while charging another 42 cents cash, balance conditional. This result is to be avoided when possible. We call attention to the following language in the case of *Chicago, B. & Q. R. Co.* v. *E. Bernier & Sons*, 56 F. Supp. 691:

"It seems obvious that discriminatory practices in the application of rates will be the result if defendant's position is upheld. Therefore, in interpreting the tariff, it seems reasonable and sound to indulge in a construction, if consistent with the terms of the tariff, which will prevent the existence of this very evil." *Ibid*, p. 693.

For the State Court to apply a tariff in a way which violates the prohibitions of the Interstate Commerce Act, is the same as voiding the prohibitions of the Act itself. Certiorari should be granted to review and correct this ruling.

It is interesting to note that while the Tariffs 8859E and 8859F provide a definite rate to Memphis which applies only to that one destination, the Tariffs 208C and 208D, by which the 65 cent rate is arrived, do not contain Memphis as a destination.

Tariffs 8859E and 8859F provide:

> "Inbound charges to the storage point will be computed by use of the following distance scale of rates, except that to Memphis, Tennessee, rates will be 2 cents per 100 pounds higher than rates shown below. * * * (distance) 600 miles and over 550 (rate in cents per 100 pounds) 40" (Tr. ~~Vol.~~ 69-70).

The 65 cent rate is obtained from the Tariffs 208C and 208D by use of the rule authorizing the rate to the next point beyond as the rate to an intermediate point not named in the tariff. Memphis is such an intermediate point and Moorehead, Mississippi, carrying the 65 cents rate is the next point beyond (Tr. ~~Vol.~~ 84). But by express exception this Intermediate Rule does not apply in a case where there is in some other tariff a commodity rate (Brief, *supra*, pp. 11-12). In reciting the facts necessary to make the Intermediate Rule apply, respondent's witness recited all the facts necessary to make the Exception Note 4 apply (Tr. p. 79).

The tariffs 8859E and 8859F provide a definite commodity rate of 42 cents from Houston to Memphis by use of the distance scale; they provide a rate on the same article (cotton) to the intermediate destination (Memphis) applicable over the same route from the same point of origin (Houston).

The Interstate Commerce Commission has held that such distance scale rates take precedence over the rates fixed by the Intermediate Rule, even where that rule requires the other tariff to provide "a specific" rate to the intermediate point.

In the case of *Watab Paper Co.* v. *Great Northern Railroad*, 115 I. C. C. 37, the Railroad had established a rate from Duluth and other points at the head of the Lakes to the Twin Cities of $1.65. The complainant sought to have applied to intervening points, Sartell and Little Falls, by virtue of the Intermediate Rule, the rate of $1.65 instead of a mileage rate applicable to those intervening points. These mileage rates were fixed on the basis of a table approved by the Interstate Commerce Commission in 69 I. C. C., p. 18, and the provision as to Little Falls was as follows:

> "From Duluth, Minn., and other points at the head of the Lakes to the destination specified * * * rates per ton of 2000 pounds set forth in the following table * * * 150 miles and over 140.....$1.82."

The Court held:

> "In support of the allegation of inapplicability * * * complainant refers to a rate of $1.65 on fine coal from all of these origins to the Twin Cities, subject to the intermediate clause, and points out that the routing under the rate was not restricted. It contends that the $1.65 rate was applicable under the intermediate provisions. The contention is without merit. The intermediate provisions by its terms applies only in the absence of a *specific rate. The rates from these origins to Little Falls are published as separate items in amounts per ton and are specific rates*" (Italics supplied).

Also, the Interstate Commerce Commission has held in *Commodity Credit Corp.* v. *C., R. I. & P. Ry. Co.*, S. D. 201761, that the rates, as applied on the movements of cotton from Houston to Memphis, fixed by the same distance scale in a similar tariff are the highest reasonable rates for such movements. The Commission waived collection of the charges on the higher rate named in the

Tariff 208G—a subsequent issue of the same Tariff 208C and 208D herein considered (~~Alexander, Tr. Vol. ....., Exs. 28 and 33~~).

Since this petitioner has already paid the full charges fixed by Tariffs 8859E and 8859F, which are the highest reasonable charges and definitely apply from Houston to Memphis, respondent's suit should be dismissed, the judgment of the State Court vacated, and petitioner awarded costs.

## TENNESSEE APPELLATE PROCEDURE.

The petitioner in this cause requests Writs of Certiorari directed to both the Supreme Court of Tennessee, and the Court of Appeals of Tennessee, Western Division, because of the nature of the Appellate procedure in the State of Tennessee, and because it is impossible to tell to which court the Writ should issue. The questions of law from the Chancery Courts of Tennessee are appealable directly to the Supreme Court. Therefore, when the decision of the Chancery Court on the demurrer was appealed by respondent, that appeal was to the Supreme Court. But the decision of the Supreme Court was not final and the cause was remanded to the Chancery Court for further proceedings. In any case tried upon an issue of fact, the appeal from the Chancery Courts of Tennessee to issue from that court to the Court of Appeals. When the case was decided adversely to this petitioner by the Court of Appeals of Tennessee issues of fact were involved. Certiorari was requested from the Supreme Court of Tennessee to review the case, which certiorari was denied. The action of the Supreme Court of Tennessee in overruling the demurrer and in deciding by denying the certiorari and in deciding that the statute of limitations had not barred the action became a final judgment when the Supreme

Court refused to review the judgment of the Court of Appeals January 17, 1947. The statute controlling this matter is as follows:

> "The jurisdiction of the court of appeals shall be appellate only, and shall extend to all civil cases except those involving constitutional questions, * * * and excepting cases which have been finally determined in the lower court on demurrer or other method not involving a review or determination of the facts, or in which all the facts have been stipulated. * * * As to all other cases the exclusive right of removal and review shall be in the supreme court." Code of Tennessee, 1934, Sec. 10618.

Supersedeas has been granted by the Court of Appeals in which court is the final judgment (Tr. p. 60).

## CONCLUSION.

We submit that in the interest of a uniform application of the Interstate Commerce Act that Writs of Certiorari should issue as requested and that this court should review this case and render judgment in accord with its own holdings in the Midstate Horticultural Co. case and other cases above cited.

Respectfully submitted,

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